Supreme Court, U.S.
FILED
APR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-333

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

DELTA AIR LINES, INC.,
*Petitioner,*

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

ALLYN O. KREPS
*(Counsel of Record)*
LOUIS TOUTON
ROBERT DEBERARDINE
JONES, DAY, REAVIS & POGUE
355 South Grand Avenue
Suite 3000
Los Angeles, CA 90071
(213) 625-3939
*Counsel for Petitioner*

*Of Counsel*
ERWIN N. GRISWOLD
ROBERT LAYTON
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

WALTER BRILL
Law Department,
Delta Air Lines, Inc.
1030 Delta Boulevard
Atlanta, GA 30320
(404) 765-2692

April, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS


Page

ARGUMENT

I. The Decisions Below Would Have a Dramatic Adverse Effect on the National Air Transportation System ..... 2

II. Section 105(b) Does Not Permit Extraterritorial Regulation of Airline Routes by Local Governments ..... 5

CONCLUSION ..... 8

APPENDIX A—Letter from Counsel for Suburban O'Hare Commission to Village of Elk Grove Village, dated January 13, 1988 ..... 1a

APPENDIX B—Letter from James H. Burnley, IV, Secretary of Transportation, to R. W. Allen, Chairman of the Board of Delta Air Lines, Inc., dated February 16, 1988 ..... 6a

## TABLE OF AUTHORITIES


*CASES* Page

*Airport Commission v. CAB*, 300 F.2d 185 (4th Cir. 1962) ..... 3

*City of Dallas v. CAB*, 221 F.2d 501 (D.C. Cir. 1954) ..... 3

*City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982) ..... 3

*Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979) ..... 3

*STATUTES*

Pub. L. 85-726, Aug. 23, 1958, 72 Stat. 731 ..... 6

*OTHER AUTHORITIES*

Compilation by I. P. Sharp of data from Department of Transportation Form 41 ..... 5

Jeppeson Airway Manual (1987) ..... 4

E. Kennedy, *The American Airlines Industry and the Necessity of Deregulation*, 9 Akron L. Rev. 631 (1976) ..... 6

D. McKinnon, *Aviation's Future Under Deregulation*, 32 Fed. Bar News & J. 24 (1985) ..... 6

New York Times, Jan. 31, 1988, sec. 10, p. 8, col. 1.. 7

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-333

DELTA AIR LINES, INC.,
*Petitioner,*

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE *

The brief filed by the Solicitor General ignores the direct challenge that the decisions below present to the Congressional mandate for uniform airline deregulation. It does this *first* by erroneously assuming that the proprietary powers of a multiple airport operator are different from those of a single airport operator. Section 105, however, does not support this premise. And, *second*, by characterizing the question as "of extremely limited applicability" (U.S. Br. 10), the Solicitor General belittles the widespread impact that these decisions would have even if restricted to multiple airport operators. In fact, they would empower local governments to regulate airline routes, rates, and services from airports in at least seven metropolitan areas across the country serving 137 million passengers annually, or over thirty percent of the total for all United States airlines.

* Compliance with Rule 28.1 has been made in the Petition. Since that time Sky West, Inc., has become an affiliate of the petitioner.

The Solicitor General's reluctance to assert federal preemption leads him to ignore the power and purpose of Congress to replace all government regulation with marketplace competition. Thus, he fails to give proper weight to the serious adverse effects the decisions below would have on airline competition. Although the Solicitor General acknowledges that Congress enacted section 105 "to prevent local regulation from filling the regulatory vacuum [the Airline Deregulation Act] created" (U.S. Br. 5), he fails to recognize that the decisions below would give local governmental airport proprietors, whether multiple or single airport operators, veto power over which routes airlines may fly—the precise type of regulatory power which the Deregulation Act took away from the Civil Aeronautics Board and dedicated to the marketplace. In view of the widespread applicability of the questions presented and the drastic interference local governmental route regulation would cause in the competitive marketplace mandated by the Airline Deregulation Act, certiorari should be granted.

### I. The Decisions Below Would Have a Dramatic Adverse Effect on the National Air Transportation System.

In discussing the decisions below, the Solicitor General (1) seeks to limit their effect only to airports operated by multiple airport proprietors, (2) asserts that such proprietors operate in only five metropolitan areas, and (3) claims that the number of affected areas is further reduced by physical limitations of the airports in two of the areas. The argument is wrong on all three fronts.

There is no basis under section 105 for confining the decisions below to multiple airport proprietors. A perimeter rule established by a multiple airport proprietor is no less a route regulation and no more an exercise of a proprietary power than one made by a single airport proprietor. Thus, the district court properly concluded that the perimeter rule regulates routes when it diverts long distance flights away from LaGuardia to other air-

ports. It is, moreover, well-established in both CAB and court decisions that routes are properly defined from an airport-to-airport perspective. *Airport Commission v. CAB*, 300 F.2d 185, 188 (4th Cir. 1962) (CAB may specify airport to serve Winston-Salem area); *City of Dallas v. CAB*, 221 F.2d 501, 504 (D.C. Cir. 1954) (same for Dallas-Fort Worth area); *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644, 652 (1979) (same for Love Field/Dallas-Fort Worth).

The fact that a governmental agency may operate more than one airport has no rational bearing on whether its extraterritorial regulation of routes is the exercise of a "proprietary power." What destination an airplane serves after leaving an airport is not a "local matter" within the legitimate concern of a local proprietor, no matter how many airports it operates in its area. Local governments do not have the national accountability which is necessary to ensure coherence in their attempts to regulate the nation's air routes.[1]

Despite the Solicitor General's attempt to confine the decisions below to multiple airport proprietors, they cannot be so confined. For example, a legal opinion recently rendered by counsel for the Suburban O'Hare Commission interprets the decisions below as holding "that the ability to enact a perimeter rule is within the powers of airport proprietors which are not preempted by federal regulation," with no mention of any limitation to multiple airport proprietors. (App. A, infra p. 1a.)

Even if limited to multiple-airport proprietors, the decisions below would permit locally imposed route limitations on a substantial portion of the nation's air traf-

---

[1] Citing *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982), the Solicitor General seeks to equate the powers of the FAA as an airport proprietor with those of local governments. (U.S. Br. 4.) The terms of section 105, however, specifically restrict the powers of local governments, not those of the FAA.

fic. As the Solicitor General concedes, five of the largest metropolitan areas—New York, Los Angeles, Chicago, Washington, and Houston—have airport authorities operating multiple airports with existing commercial service. The Solicitor General attempts to limit the importance of this list by asserting that perimeter rules similar to those at LaGuardia are "highly unlikely" at Houston Hobby and Chicago Midway because these airports are incapable of handling long-range flights. (U.S. Br. 11.) In fact, however, these airports, with runways of 7600 and 6519 feet, respectively, have a long-range flight capacity not materially different from LaGuardia, with its 7000 foot runway, and therefore, if the decisions below stand, Houston and Chicago are prime candidates for perimeter rules. See Jeppeson Airway Manual (1987).

In assessing the practical impact of the decisions below, the State of Hawaii, which also operates multiple airports with commercial service, must be added to this list. Dallas-Fort Worth has a similar situation, with the City of Dallas operating Love Field and Dallas-Fort Worth International Airport under the joint control of both cities.[2]

This roster of major metropolitan areas belies the Solicitor General's attempt to minimize the decisions below. During 1987, the airports in these seven areas had 137 million passenger enplanements, or fully 30.8 percent of the domestic total. Even the five areas which the Solicitor General lists as served by multiple airport proprietors account for 105 million passenger enplane-

---

[2] Thus, the City of Dallas has an ability to coordinate restrictions at its two airports similar to the Port Authority's. Indeed, it would appear that even unrelated airport proprietors can easily "coordinate" their regulations and thereby fall within the scope of the decisions below. Logically, therefore, the Solicitor General's proposed distinction has little practical effect at all.

ments, or 23.5 percent of the total for United States airlines.[3]

The expansion of local authority announced by the decisions below is both widespread and striking. Its scope will likely expand as airport operators expand their new powers. For example, Cleveland and Detroit have limited commercial service at secondary airports. Moreover, many cities currently using only one airport for commercial purposes (e.g., Kansas City, Mobile, and Nashville) operate satellite airports capable of handling jet service. The rational of the decision below would also apply to these airports. As the Secretary of Transportation recently acknowledged in commenting on the decisions below, "a proliferation of similar local rules would cripple the national air transportation system . . . ." [4]

**II. Section 105(b) Does Not Permit Extraterritorial Regulation of Airline Routes by Local Governments.**

In assessing the power of the Port Authority to enact a perimeter rule, it is essential to keep in mind that the rule *directly and extraterritorially* regulates airline routes. Unlike the hypothetical parking restrictions discussed by the Solicitor General, the perimeter rule is not one which merely "might affect the routes" airlines choose to fly, by, for example, making an airport unattractive to vacationers. (U.S. Br. 8.) Instead, by its perimeter rule the Port Authority tells airlines that they cannot fly routes non-stop which are beyond the 1500-mile perimeter.

In enacting the Airline Deregulation Act, Congress replaced the Civil Aeronautics Board's regulatory au-

---

[3] *See generally* Compilation by I. P. Sharp, Inc., 1000 Vermont Avenue, N.W., Suite 510, Washington, D.C. 20005, of data from Department of Transportation, Research and Special Programs Administration, Form 41, Schedule T-3.

[4] Letter from Secretary of Transportation James H. Burnley, IV, to R. W. Allen, Chairman of the Board of Delta Air Lines, Inc. (Feb. 16, 1988) at 2, reproduced as Appendix B, *infra* p. 7a.

thority with market forces, not with local governmental regulation. Prior to deregulation, the CAB exercised pervasive authority to control airline routes. *See* Pub. L. 85-726, Aug. 23, 1958, 72 Stat. 731; *see generally* D. McKinnon, *Aviation's Future Under Deregulation*, 32 Fed. Bar News & J. 24 (1985); E. Kennedy, *The American Airlines Industry and the Necessity of Deregulation*, 9 Akron L. Rev. 631 (1976). As demonstrated by the legislative history quoted by the Solicitor General, Section 105(b) was intended to preserve "long recognized" and "existing proprietors' rights" (U.S. Br. 9), not to expand those rights into areas formerly regulated by the CAB. Yet by giving the Port Authority the power to dictate which routes airlines may fly, the decisions below have given section 105(b) precisely the effect Congress intended to prevent.

The LaGuardia, Kennedy, and Newark Airports serve different markets, certainly from the passengers' point of view, and deregulation was clearly intended to prevent local governments and airport operators from telling passengers which market they must choose. Suppose, for example, two independently operated airports—say Scranton and Bethelem—agreed that one should accept flights from certain airports and the other airport would accept flights from other airports. Factually and economically the situation would not be different from that involved here, but it would be clearly a direct, extraterritorial regulation of routes by airport operators.

Nonetheless, the Solicitor General asserts that the LaGuardia perimeter rule is a valid exercise of a proprietary power because it "may be a reasonable way to relieve congestion" (U.S. Br. 6). Petitioner does not dispute that reducing ground congestion is an appropriate local goal. The issue, however, is not *what* goal the Port Authority seeks to achieve but *how* it seeks to achieve it. The *fundamental purpose* of section 105 is to preclude local regulation of rates, routes and services. To say that this can nevertheless be done in the guise of proprietary

powers unduly undermines the basic objective of Congress in enacting deregulation of the airline industry.[5]

The decisions below are especially troublesome because of the broad deferential standard used by the district court and supported by the Solicitor General. Under this standard, the means chosen by the local proprietor "will not [be] second guess[ed]" (Pet. App. 17a), and will be sustained provided they "may be a reasonable way" to achieve the proprietor's goal (U.S. Br. 6).[6] The FAA, acting within its clearly granted powers, has established a slot system to regulate air congestion in the New York area. This is the Congressionally authorized way to control air congestion and precludes any interference with

---

[5] As suggested by the Solicitor General's Brief, this end-justifies-the-means analysis would permit many other forms of rate, route, and service regulation. For example, the Port Authority could determine which destinations (such as Bermuda, Nassau, and West Palm Beach) involved predominantly vacation travel and prohibit flights to them. U.S. Br. 4, n.3. Alternatively, the Port Authority could regulate discount vacation fares at LaGuardia.

This sort of uncoordinated regulation by local governments not only would defeat deregulation but also would imperil the continued smooth operation of the nation's air transportation system. For an indication of the possibilities, see the "guidelines for air travel advertising" released on December 17, 1987, by a task force of the National Association of Attorneys General, discussed in OAG Frequent Flyer for April, 1988, p. 42.

[6] Under this analysis, the Port Authority's LaGuardia perimeter rule is sustained as a method of "reduc[ing] congestion at a busy airport in order to encourage use of a less crowded airport" (U.S. Br. 6). If the "congestion" reference is to *ground* congestion, the Port Authority has no power to ease ground congestion by regulating non-stop routes. If the reference is to *air* congestion, the Port Authority obviously has no proprietory powers under section 105 to regulate air traffic. Moreover, air congestion and delays at Kennedy International and Newark Airports are consistently greater than those at LaGuardia. The Department of Transportation's recent on-time statistics at the 27 largest airports in the continental United States rank LaGuardia as 13th in on-time performance, while Newark ranks 23d and Kennedy ranks dead last at 27th. N.Y. Times, Jan. 31, 1988, sec. 10, at p. 8, col. 1.

the use of those slots, once granted. It is inappropriate under section 105, as the courts below have done, to permit local airport operators—for the asserted purpose of controlling ground congestion—to regulate extraterritorially the routes served by the nation's airlines.

## CONCLUSION

Regulation of airline rates, routes, and services has long been an exclusively federal matter. Congress has now precluded any local governmental regulation of rates, routes, and services and left those matters to the marketplace, limited only by FAA safety regulation. In enacting section 105 Congress made clear that local governments were not to be permitted to displace the marketplace competition created by airline deregulation. The decisions below permit major airport authorities, and ultimately all airport operators, to become mini-CABs. To fulfill the Congressional purpose and to protect deregulation, certiorari should be granted.

Respectfully submitted,

ALLYN O. KREPS
*(Counsel of Record)*
LOUIS TOUTON
ROBERT DEBERARDINE
JONES, DAY, REAVIS
& POGUE
355 South Grand Avenue
Suite 3000
Los Angeles, CA 90071
(213) 625-3939
*Counsel for Petitioner*

*Of Counsel*
ERWIN N. GRISWOLD
ROBERT LAYTON
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

WALTER BRILL
Law Department,
Delta Air Lines, Inc.
1030 Delta Boulevard
Atlanta, GA 30320
(404) 765-2692

April, 1988

# APPENDICES

## APPENDIX A

KARAGANIS & WHITE LTD.
ATTORNEYS AT LAW
414 NORTH ORLEANS STREET—SUITE 810
CHICAGO, ILLINOIS 60610
(312) 630-1177

JOSEPH V. KARAGANIS
A. BRUCE WHITE
BARBARA ANNE MAGEL
KATHLEEN M. DONAHUE
ELLEN LOIS ZISOOK

January 13, 1988

President Charles Zettek
Village of Elk Grove Village
901 Wellington Avenue
Elk Grove Village, Illinois 60007

Dear President Zettek:

You have requested that we provide you with a legal opinion concerning the ability of the City of Chicago, *as proprietor* of O'Hare International Airport, to regulate aircraft operations at the airport. Our legal opinion is as follows:

> The City of Chicago, *as the airport proprietor*, has the legal ability to restrict aircraft operations at any of its airports, including O'Hare.

Because various *unsupported* claims have been made by various interested parties as to the issue of the City's ability to regulate, we have intensively researched the question. In this letter, we include explicit "chapter and verse" citations to the authorities supporting the above conclusion.

We emphasize that the legal authority of the City to restrict operations is wholly independent from any conditions or restrictions under 14 C.F.R. Part 150. Further, FAA approval is not a legal prerequisite for the exercise of this authority by the City of Chicago.

Under existing law, the proprietor of an airport has the right to impose noise control restrictions on aircraft using the airport. These restrictions include restrictions on the types of aircraft which may use the airport, restrictions on the number of operations at the airport, curfews, trip length restrictions and fleet mix requirements. These types of restrictions find support in FAA's own policy documents and have been upheld by the courts.

The FAA itself has stated:

> Compliance with Part 36 is not to be construed as a federal determination that the aircraft is 'acceptable' from a noise standpoint, in particular airport environments. Responsibility for determining the *permissible noise levels for aircraft using an airport* remains with *the proprietor* of that airport. [T]he noise limits specified in Part 36 . . . . *are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors.* . . .
>
> FAA preamble to Part 36 engine noise standards, 34 FR 18355 (November 18, 1969).

Congress has the power under the Constitution to regulate the operations of airports for noise abatement purposes, but it has chosen not to do so. This congressional policy leaves airport proprietors responsible for the regulation of their airports for noise abatement purposes.

> FAA regulations on sonic booms, 43 FR 28417 (June 29, 1978).

The *Aviation Noise Abatement Policy*, FAA/DOT, FAA-EQ-78-11 (November 18, 1976), published by the FAA, agreed with those judicial decisions which held that proprietor regulations are not preempted by federal law. The document also recognized that proprietors may undertake restrictions subject only to Constitutional prohibitions on interstate commerce and unjust discrimination. See, *Aviation Noise Abatement Policy* at pp. 31-34.

Congress too has explicitly affirmed the proprietor's regulatory authority in 49 United States Code, section 1305 (b) (1). In explaining the purpose of this section of the statute, Senator Kennedy stated that Congress did not want to interfere with the "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level." *Remarks of Senator Kennedy on 49 U.S.C. Section 1305(b) (1)*, at 124 Congressional Record 37419.

The federal courts have repeatedly upheld the power of proprietors, such as the City of Chicago, to control aircraft noise. The United States Court of Appeals for the Ninth Circuit, in *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), upheld local noise reduction ordinances which included: a night curfew; restrictions on low aircraft approaches on weekends; a maximum single noise event level; a prohibition on all jets; and a fine for any jet landings or takeoffs. In upholding the ordinances, the Court stated that:

> We have held that the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation.
>
> * * * *
>
> The legislative history shows that Congress intended that municipal corporations enact reasonable regula-

> tions to establish acceptable noise levels for airfields and their environs.
>
> * * * *
>
> The reasonable inference . . . is that Congress intended to allow a municipality flexibility in fashioning its noise regulations.
>
> 659 F.2d at 104.

That same year, in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir.), *cert. den.*, 455 U.S. 1000 (1981), the Ninth Circuit affirmed the right of the of the Hayward Air Terminal, which prohibited noisy aircraft from operating at the airport during nighttime hours, finding that Congress and the FAA had not preempted the area of local regulation.

In *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), the United States Court of Appeals for the Second Circuit affirmed a regulation of the Port Authority of New York and New Jersey which prohibited non-stop flights to or from LaGuardia Airport in excess of 1500 miles. The Port Authority had established the regulation in order to limit congestion at LaGuardia Airport. The Court found that the ability to enact a perimeter rule is within the powers of airport proprietors which are not preempted by federal regulation. 817 F.2d at 227.

As the above discussion reveals, the City of Chicago, as the airport proprietor, has the legal ability to restrict aircraft operations at O'Hare International Airport. These regulations may include curfews, restrictions on aircraft types, restrictions on total noise levels and restrictions on single event noise levels. The ability of the City, as proprietor, to initiate these restrictions is totally unrelated to any Part 150 Study which may or may not be undertaken for the airport.

If you require any further information on this subject, please do not hesitate to contact us.

Sincerely,

/s/ Joseph V. Karaganis
JOSEPH V. KARAGANIS
Counsel, Suburban O'Hare Commission

/s/ Ellen Lois Zisook
ELLEN LOIS ZISOOK
Counsel, Suburban O'Hare Commission

## APPENDIX B

[SEAL]

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

February 16, 1988

Mr. R.W. Allen
Chairman of the Board
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

Dear Ron:

This is in response to your letter regarding this Department's position on Delta's petition for a writ of certiorari seeking Supreme Court review of a decision of the United States Court of Appeals for the Second Circuit. That decision upheld the "perimeter rule" adopted by the Port Authority of New York and New Jersey under which nonstop airline flights of more than 1500 miles to or from LaGuardia Airport are prohibited.

As I believe you know, in 1986 this Department urged the Justice Department to intervene as a plaintiff in the District Court when Western Air Lines originally challenged the perimeter rule. However, the District Court held an evidentiary hearing and ruled in favor of the Port Authority before the Department's request to intervene could be acted upon. Unfortunately, although we continue to believe that the perimeter rule is discriminatory and is not rationally related to the accomplishment of a legitimate proprietary purpose, in light of the record created at that hearing, the District Court's contrary findings are not vulnerable on appeal.

We recognize the competitive consequences that the perimeter rule has on Delta's efforts to compete through its

Salt Lake City hub. However, we are constrained to conclude that this case is not an appropriate vehicle for Supreme Court consideration of the scope of the proprietary exception to federal preemption of local regulation of airline "rates, routes, and services." On the factual record created in the District Court, the Supreme Court would likely believe that the Port Authority had shown a rational connection between its perimeter rule and such proprietary interests as baggage, parking, and terminal overcrowding. Such a perspective, although erroneous, could lead to a broad holding that would legitimize perimeter rules at all airports, and could even lead to an expansion of the proprietor exception in other contexts. We believe that this is a risk that should not, and need not, be accepted.

The Second Circuit opinion is a narrow holding; while we agree with your statement that a proliferation of similar local rules could cripple the national air transportation system, the Second Circuit held only that "the rule, *at least when executed by a multi-airport proprietor such as the Authority*, falls within the proprietary powers of airport operations exempted from preemption by section 1305 (b) (1)." In our view, there is little likelihood that any other multi-airport proprietor will implement such a rule.

As you know, we have suggested to the Port Authority that this dispute could be resolved without additional litigation by virtue of Delta's ability to operate its Salt Lake City flights from its own terminal, which is less crowded than the main LaGuardia terminal. We have been advised that the Port Authority is considering that issue, and we hope that they will be able to accommodate your request.

I hope that this information is helpful.

Sincerely,

/s/ Jim Burnley
JIM BURNLEY